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No. 86-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JUDY'S FOODS, INC., *et al.*,
Petitioners,

v.

A&B FOOD SERVICES CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR THE PETITIONERS

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CONSTITUTIONAL PROVISION:

U.S. Const. Amend. VIII:

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ARGUMENT

The petition for certiorari presents two constitutional questions that this Court has already described as important and warranting review. Respondents do not dispute the importance of the questions presented, and their arguments opposing review are unpersuasive.

I. THE QUESTIONS PRESENTED ARE PROPERLY BEFORE THE COURT.

Respondents contend (Br. in Opp. 3-6) that petitioners waived their constitutional objections by not denominating them as such in the district court and during the pendency of the appeal. This contention is without merit.

There can be no question that in the proceedings below petitioners challenged the punitive damages award as excessive and the trial court's failure to instruct the jury

on the clear and convincing standard of proof. Specifically, petitioners argued both in the district court and on appeal that the punitive damages award was unlawful because it violated a common law requirement that punitive damages must bear a reasonable relationship to actual injury. The common law rule on which petitioners relied in the lower courts has the same historical underpinnings as the Excessive Fines Clause of the Eighth Amendment, on which petitioners base their constitutional argument. *See* Pet. for Cert. 7-9. With regard to the proper standard of proof for punitive damages, petitioners argued in the district court and on appeal that the elements of fraud must be proven by clear and convincing evidence. This argument subsumed within it the claim that an award of punitive damages for any fraudulent conduct found must also be based on a heightened standard of proof.

The fact that petitioners did not initially clothe their arguments in constitutional garb is not dispositive, for a number of reasons. To begin with, petitioners' arguments below were more than sufficient "to bring into focus the precise nature of the alleged error[s]." *Palmer v. Hoffman*, 318 U.S. 109, 119 (1943). The district court was placed on notice concerning petitioners' objections to the excessive nature of the punitive damages award and to the court's failure to instruct the jury to assess petitioners' liability for fraud (and, necessarily, for any punitive damages arising therefrom) under the clear and convincing evidence standard.

Moreover, petitioners' constitutional arguments were presented to, and considered by, the court of appeals. In denying the petition for rehearing, that court stated that the constitutional arguments raised by petitioners had been "fully considered upon the original submission and decision of the case." Pet. App. 8a. Having been raised and decided by the court of appeals, the constitutional questions presented in the petition are properly before

this Court.[1] Thus, in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 255-256 (1981), the Court rejected the argument that a challenge to a jury instruction on punitive damages had not been adequately preserved because the petitioner had failed to object to the charge at trial. Noting that the district court and court of appeals had reached and adjudicated the petitioner's claim, the Court concluded that the interests of fair and effective administration of justice would not be served by this Court's refusal to consider that claim. *Cf. Youakim v. Miller*, 425 U.S. 231, 233-234 (1976) (Court considered Supremacy Clause issue even though that issue had not been raised in the lower court as an independent ground for invalidating the state law in question).

Finally, we note this Court's occasional practice of deciding an issue not presented either in the district court or in the court of appeals, where the issue is important and recurring and has been squarely presented in the petition for certiorari. *E.g., Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). Here, of course, the constitutional issues were raised and decided adversely to petitioners in the court of appeals, and they were raised (although not specifically in their constitutional dimension) in the district court. Given the unquestioned importance and recurring nature of these issues, the interests of sound judicial administration would be served by this Court's granting review and addressing the issues on their merits.

II. THE HISTORY OF THE EXCESSIVE FINES CLAUSE DEMONSTRATES THAT IT APPLIES TO PUNITIVE DAMAGES AWARDS.

Respondents candidly concede that "[t]he amount [of punitive damages] awarded against each Petitioner *was calculated to punish*." Br. in Opp. 13 (emphasis added).

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[1] For this reason, the cases on which respondents rely (Br. in Opp. 5-6) are inapposite. In those cases, the questions presented had never been raised in the lower courts.

Respondents argue (Br. in Opp. 6-16), however, that punitive damages awards are not subject to the Excessive Fines Clause of the Eighth Amendment because that Clause applies only to punishments exacted in criminal cases. This argument falls of its own weight.

All of the cases on which respondents rely (Br. in Opp. 7-10) in support of their contention that the Excessive Fines Clause is confined to criminal punishments involved the Cruel and Unusual Punishment Clause, not the Excessive Fines Clause. As demonstrated in the petition, at 7-9, the history of the Excessive Fines Clause establishes that the Clause was intended to apply to civil as well as criminal fines. Respondents do not challenge our historical analysis. Thus, the cases cited by respondents are inapposite and their argument is misdirected because they have failed to focus on the precise provision of the Eighth Amendment on which we rely.

III. THE DUE PROCESS ISSUE HAS NOT BEEN PREVIOUSLY DECIDED BY THIS COURT.

Relying on *Smith v. Wade*, 461 U.S. 30 (1983), respondents mistakenly assert (Br. in Opp. 17) that this Court has already considered and rejected the due process issue presented in the petition. The petition presents the question whether the Due Process Clause bars the imposition of punitive damages absent evidence that satisfies the clear and convincing standard of proof. This Court's decision in *Smith v. Wade* did not address that question.

In *Smith v. Wade*, the plaintiff, a prison inmate, recovered punitive damages from a prison guard who was found to have been grossly negligent in placing the plaintiff in a section of the prison where he was beaten and sexually assaulted by other inmates. The guard argued that punitive damages could not be based on reckless disregard for the plaintiff's rights or safety, but required actual malicious intent to injure the plaintiff. 461 U.S.

at 37. The Court rejected this argument and adhered to the traditional rule that punitive damages can be awarded "not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others, or even gross negligence." *Id.* at 48 (footnote omitted).

Smith v. Wade, therefore, concerned the substantive elements that must be found before punitive damages can be awarded. It did not address the separate, procedural question presented here, concerning the constitutionally-required standard of proof for assessing whether those substantive elements have been established. On this issue, respondents have failed to respond to the compelling reasons set forth in the petition for requiring application of a heightened standard of proof on the issue of liability for punitive damages. *See* Pet. for Cert. 11-14.

CONCLUSION

For the foregoing reasons and those set forth in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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